In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-24

UPPER ALLEGHENY SAND & GRAVEL CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion (Pet. App. 26–35) and final judgment (Pet. App. 36–39) of the district court are unreported. The opinion of the court of appeals, reported at 441 F. 2d 356, appears at Pet. App. 17–24.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1971. The petition for a writ of certiorari was filed on July 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

440-801—71

QUESTION PRESENTED

Whether, on the facts of this eminent domain case, the district court's findings of valuation were correct.

STATEMENT

Petitioner, Upper Allegheny Sand & Gravel Co., Inc. (Allegheny), held a sand and gravel lease and operated a sand and gravel plant on 80 acres of the Allegheny Indian Reservation of the Seneca Nation of Indians. On December 9, 1963, the United States brought a condemnation proceeding to acquire flowage and other easements over 1,132.50 acres, including the leased land.

In adjudicating the amount of damages due petitioner, the district court found the leasehold interest to be of no value because the additional investment needed to exploit the resources exceeded the value of the possible exploitation (Pet. App. 33–34). The court also found petitioner's stockpile of sand and gravel valueless because the cost of removal exceeded the resale value (Pet. App. 34–35).

An experienced appraiser valued petitioner's small, dilapidated plant at $8,000 to $8,500. The bulk bid on the machinery and equipment in place was, in fact, $8,500. By breaking the equipment into lots, however, $9,060 was realized by the auctioneer in a piecemeal sale. Accordingly, the court awarded the higher sum of $9,060 as just compensation to Allegheny (Pet. App. 33–34). The court concluded that the cost-less-depreciation approach was an improper method of

valuation of the buildings. For these, the court awarded $3,000 (Pet. App. 35).

The court of appeals affirmed. It ruled that the sand and gravel stockpiles were noncompensable personalty, and not fixtures, under both state and federal law (Pet. App. 23–25), and that the lease had no value in view of the investment required (Pet. App. 22).

While noting its earlier decisions that the condemnee need not ordinarily be content with salvage value for fixtures, the court stated that where, as here, the equipment is not economically well-suited to the site, a piecemeal sale may result in the higher and fairer valuation. The court found no error in the district court's determination of the value of the buildings, which was within the range of the testimony (Pet. App. 21–22).

ARGUMENT

The decision is correct and presents no conflict with any decision of this Court or other court of appeals and no question warranting further review. As is plain from the opinions of the court of appeals (Pet. App. 17–24) and the district court (Pet. App. 25–35), the issues raised before the district court, the court of appeals and here are almost exclusively factual. The governing principles of federal eminent domain law were followed. See *United States* v. *Miller*, 317 U.S. 369, in general, and *United States* v. *General Motors Corp.*, 323 U.S. 373, and *United States* v. *Petty Motor Co.*, 327 U.S. 372, in support of the court of appeals' treatment of the leasehold interest.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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